Teamsters Local 460 (Superior Asphalt Company) *and* Wiley L. Gardner. Case 17–CB–3512

September 28, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND OVIATT

On August 31, 1989, Administrative Law Judge Irwin H. Socoloff issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions, for the reasons stated below, and to adopt the recommended Order.

The Respondent operates a nonexclusive hiring hall referring individuals to jobs in the construction industry. Beginning in January 1988, the Respondent instituted a policy requiring nonmembers to pay a $25 fee to sign the referral list. No such fee is required from the Respondent's members.

The General Counsel contended at hearing that the Respondent's policy breached its duty of fair representation in violation of Section 8(b)(1)(A) of the Act because the fee exceeds the nonmembers' pro rata share of the hiring hall's operation cost. The judge dismissed the complaint, finding that although the Respondent has a duty of fair representation in the operation of its nonexclusive hiring hall, the fee was not so outrageous as to breach the duty. The General Counsel excepts to the judge's failure to find a breach of the duty of representation. For the following reasons, we agree with the judge that the complaint should be dismissed.

A union's duty of fair representation derives from its status as the exclusive bargaining representative of employees in a specified unit. *Miranda Fuel Co.*, 140 NLRB 181 (1962), enf. denied 326 F.2d 172 (2d Cir. 1963). Where a union has a nonexclusive referral arrangement with an employer, the union has no exclusive status relating to potential employees. Individuals can obtain employment either through the union's hiring hall or through direct application to the employer. Without the exclusive bargaining representative status, the statutory justification for the imposition of a duty of fair representation does not exist. Accordingly, no duty of fair representation attaches to a union's operation of a nonexclusive hiring hall. See *Laborers Local 889 (Anthony Ferrante & Sons)*, 251 NLRB 1579 (1980).[1]

We acknowledge that in some of its exclusive hiring hall decisions, the Board has not couched its finding of violations in terms of a breach of the duty of fair representation. Rather it has reasoned that a union's monopoly over available jobs, combined with procedures that favor union members or irregularities that result in giving great discretion in referrals to the union agents who run the hall, tends unlawfully to encourage employees to be compliant union members. E.g., *Plumbers Local 460 (McAuliffe Mechanical)*, 280 NLRB 1230 (1986), and cases there cited; *Operating Engineers Local 18 (William F. Murphy)*, 204 NLRB 681 (1973), enf. denied on other grounds 496 F.2d 1308 (6th Cir. 1974). That reasoning does not apply, however, in the case of a nonexclusive hiring hall because a union operating a nonexclusive hiring procedure lacks the power to put jobs out of the reach of workers.

Because, in the circumstances of this case, we find that no duty of fair representation exists and that the General Counsel has alleged no other adequate basis on which to predicate liability, we shall dismiss the complaint.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] To the extent that *Plumbers Local 13 (MCA of Rochester)*, 212 NLRB 477 (1974), and *Bricklayers Local 8 (California Conference of Mason Contractor Assns.)*, 235 NLRB 1001 (1978), indicate the existence of a duty of fair representation in a nonexclusive hiring hall setting, they are not persuasive authority. *MCA of Rochester* relied on a case in which the union operated an exclusive hiring hall and thus did not support the proposition that a union operating a nonexclusive hiring hall owes ''a duty of fair and impartial representation to those who seek to use its services.'' 212 NLRB at 479. *California Conference* involved an exclusive hiring hall and the Board's comments concerning a union's obligations when operating a nonexclusive hiring hall were dicta. We do not mean to suggest, however, that a union operating a nonexclusive hiring hall can never be found guilty of commiting unfair labor practices with respect to referrals. When, for example, a union denies a member a referral in retaliation for the employee's participation in protected activity, the union violates Sec. 8(b)(1)(A) of the Act. E.g., *Plasterers Local 121*, 264 NLRB 192 (1982); *Teamsters Local 923*, 172 NLRB 2137 (1968).

Stephen E. Wamser, Esq., for the General Counsel.
James G. Walsh, Jr., Esq., of Kansas City, Missouri, for the Respondent.

DECISION

STATEMENT OF THE CASE

IRWIN H. SOCOLOFF, Administrative Law Judge. Upon a charge filed on May 4, 1988, by Wiley L. Gardner, an individual, against Teamsters Local 460 (the Respondent), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 17, issued a complaint dated November 2, 1988, alleging violations by Respondent of Section 8(b)(1)(A) and Section 2(6) and (7) of the Na-

tional Labor Relations Act (the Act). Respondent, by its answer, denied the commission of any unfair labor practices.

Pursuant to notice, trial was held before me in Mission, Kansas, on January 17, 1989, at which the General Counsel was represented by counsel and all parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.[1] Thereafter, the General Counsel filed a brief which has been duly considered.

On the entire record in this case, and from my observations of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, Teamsters Local 460, has its office in St. Joseph, Missouri, where, inter alia, it operates a nonexclusive hiring hall. The Union, pursuant to collective-bargaining contract provisions, refers employees to various employers in the construction industry, including Superior Asphalt Company, an asphalt contractor engaged in heavy highway construction with an office and place of business located in Kansas City, Missouri. That Company performs work both in Missouri and Kansas. During calendar year 1988, Superior Asphalt Company, in the course and conduct of its business operations, performed asphalt work valued in excess of $50,000 directly for customers located outside the State of Missouri. I find that Superior Asphalt Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

Respondent Union was signatory to a collective-bargaining agreement negotiated by and between the Associated General Contractors of Missouri (AGC) and Joint Councils of Teamsters Nos. 13 and 56, St. Louis and Kansas City, Missouri. That agreement, effective May 1, 1986, to May 1, 1989, covered certain employees performing work in the construction industry for signatory employers,[2] throughout much of the State of Missouri, and contained the following provision:

> The parties agree that the Employer will notify the Union of employment opportunities in order that the Union may have an opportunity to refer qualified applicants. Nothing herein, however, shall require the Employer to use Union referrals as the exclusive source of applicants.

Pursuant thereto, Respondent Union, for a number of years, has operated a referral system or nonexclusive hiring hall, referring individuals to certain job opportunities in the construction industry.

In the instant case, the General Counsel contends that, beginning January 1, 1988, Respondent breached its duty of fair representation, in violation of Section 8(b)(1)(A) of the Act, by charging nonmembers the sum of $25 to register for job referrals through its hiring hall. In the General Counsel's view, that sum of money ''is not reasonably related to the proportionate cost of services provided by Respondent to the nonmembers paying such sum of money.'' In its brief, General Counsel suggests that the amount charged nonmembers to register should not exceed $14.02. Further, in the General Counsel's view, it is of no moment that the hiring hall is a nonexclusive one.

B. *Facts*[3]

Wiley L. Gardner was a member of Respondent-Union for some 20 years, until 1987. At that time, he became a member of Teamsters Local 541, in Kansas City, Missouri, but continued to utilize Respondent's referral system by signing its monthly out-of-work lists. He was permitted to sign the list, in November and December 1987, despite a notice posted on Respondent's bulletin board stating, inter alia, that ''all individuals who participate in the hiring hall must be members in good standing in Local #460.'' Gardner testified that that rule was not enforced and that nonmembers were permitted to sign the list.

On the first business day in January 1988, Gardner reported to Respondent's offices to sign the January out-of-work list. He was advised by the office secretary, Nan Davis, that nonmembers had to pay a $25 fee to sign the list. Davis referred Gardner to a posted notice of a resolution passed by Respondent's executive board, empowering the Union to charge nonmembers ''a referral fee Of $25, such fee to be paid by a nonmember each time he or she seeks to utilize the services of the referral procedure by signing the out-of-work list.'' The resolution further stated that the fees ''will be used strictly to defray the cost incurred in running the referral procedure or 'hiring hall' of the Local.'' When Gardner objected to imposition of the fee, Davis called for Respondent's president, Joe McMillian, who confirmed that nonmembers would be charged $25 to sign the monthly list. Gardner refused to tender payment, and he left.

Gardner returned to Respondent's offices in February 1988, and was again asked, and he again refused, to pay $25 to sign the out-of-work list. In March, Gardner placed a telephone call to McMillian who told Garner that he would not be permitted to sign the list unless he made the required payment.

Respondent charges its members monthly dues equal to twice the hourly wage rate. As the Union represents a wide variety of employees earning different rates of pay, members do not pay a uniform amount of dues. Employees earning the construction industry rate of pay, the individuals who utilize the referral system, pay dues of approximately $32 per month.

The LM-2 report filed by Respondent, and covering calendar year 1987, is in evidence. Based on the figures contained therein, and using a *J. J. Hagerty, Inc.*[4] type analysis, the General Counsel claims that the cost to Respondent of

[1] Respondent filed a written motion to dismiss, but elected not to appear at trial.

[2] Superior Asphalt Company has signed agreements with Respondent under which Superior agreed to apply the contract terms to particular projects.

[3] The factfindings contained herein are based upon a composite of the documentary and testimonial evidence introduced at trial. The record is generally free of significant evidentiary conflict.

[4] 139 NLRB 634 (1962).

operating the hiring hall, and providing representation services, is $14.02 per member per month.

C. *Conclusions*

The Board has held that, in the operation of a nonexclusive hiring hall, a union owes a duty of fair and impartial representation to those who seek to use its services and may not, for discriminatory reasons, deny referral.[5] However, in the case of nonexclusive referral systems, the Board has declined to regulate the *manner* of referral by unions.[6]

It is beyond dispute that, to defray costs, Respondent Union lawfully could, as it did, impose a charge upon nonmembers who wished to utilize its nonexclusive referral system. The General Counsel argues, only, that the monthly fee should have been somewhat less, $14 instead of $25. However, as the fee charged is not outrageous on its face, and is decidedly less than the amount paid to the Union in monthly dues by its members, further inquiry is not warranted. For, the cost analysis sought by the General Counsel would require regulation by the Board of the manner of referral, contrary to precedent. I therefore conclude that Respondent Union did not violate Section 8(b)(1)(A) of the Act by charging nonmembers the sum of $25 to register for job referrals through its hiring hall.

[5] See, e.g., *Plumbers Local 13 (MCA of Rochester)*, 212 NLRB 477 (1974).

[6] *Penzel Construction Co.*, 185 NLRB 544 (1970).

CONCLUSIONS OF LAW

1. Superior Asphalt Company is an employer engaged in commerce, and in operations affecting commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent, Teamsters Local 460, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not violate the Act as alleged in complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The complaint is dismissed.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.